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No. 95-891

In The

Supreme Court of the United States

October Term, 1995

STATE OF OHIO,

Petitioner,

v.

ROBERT D. ROBINETTE,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Ohio

BRIEF OF OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF ROBERT D. ROBINETTE, RESPONDENT

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QUESTION PRESENTED – AMICUS FORMULATION

WHERE THE HIGHEST COURT OF A STATE CREATES A PROPHYLACTIC RULE FOR THE PURPOSE OF PREVENTING VIOLATIONS OF RIGHTS ENJOYED BY ITS CITIZENS UNDER THAT STATE'S OWN CONSTITUTION, SHOULD THIS COURT EXERCISE ITS JURISDICTION TO REVIEW SUCH RULE UNDER FEDERAL CONSTITUTIONAL ANALYSIS?

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STATEMENT OF AMICUS INTEREST

Amicus Curiae, The Ohio Association of Criminal Defense Lawyers ("OACDL"), is a private nonprofit association of five hundred twenty-five lawyers who represent the criminally accused and is affiliated with the National Association of Criminal Defense. Lawyers. Amicus OACDL seeks to provide the judiciary and legislature with the insight of its members concerning how the day-to-day operation of the criminal justice system impacts the citizens of the State of Ohio. Beyond this, however, amicus' members are deeply committed to the defense and vindication of the individual rights and civil liberties of the citizens of Ohio, from whatever source those rights may be derived, including those found within the constitution of the State of Ohio. With this in mind, the instant case is of particular importance to amicus insofar as amicus believes a fundamental issue involved, and one not heretofore examined in detail by the parties, is whether certiorari was properly granted in this case.

The case presently before this Court began as a routine traffic stop for the purpose of issuing a warning to Respondent about speeding in a construction zone; that traffic stop ended, however, with a felony drug arrest. What ensued in-between is the subject of the controversy: the arresting officer, after completing the purpose of his stop, took advantage of the situation to elicit Respondent's "consent" to search his vehicle, the search yielding contraband drugs.

On discretionary appeal, the Ohio Supreme court held that a "consensual encounter" between a motorist

and a police officer, immediately following an investigative detention, is "*likely* to be imbued with the authoritative aura of detention" thus rendering any purported consent "not consensual at all". *State v. Robinette*, 73 Ohio St. 3d 650, 655, 653 NE 2d 695, 699 (1995) (emphasis added). The Ohio Supreme Court observed that the narrow facts presented here demonstrate the need for the court to draw a "bright line be' 'een the conclusion of a valid seizure and the beginning of a consensual exchange". *Id.* at 654, 653 NE 2d at 698. This "bright line" takes the form of a verbal indication an officer must make to the motorist upon conclusion of the officer's business prior to any request for consent to search the vehicle for contraband: "At this time you legally are free to go." *Id.* at 654-55, 653 NE 2d 698-99. Twice in the body of the opinion below, the Ohio Supreme Court found this admonition warranted by the Ohio Constitution as well as the federal. *Id.*

Section 14, Article I of the Ohio Constitution states:

> **§ 14 Search warrants and general warrants.**
>
> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

These words are, of course, virtually identical to those of the Fourth Amendment of the United States Constitution. That should not be taken to indicate, however, that the former is merely co-extensive with, or is to

be read *in pari materia* with the latter.[1] In recent years, the Ohio Supreme Court has rejected such approaches to state constitutional exegesis, noting:

> One court has pointedly stated that "[w]hen a state court merely interprets the constitution of its state as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights", *Davenport [v. Garcia], supra*, 834 SW 2d at 12 [Tex. 1992].
>
> In joining the growing trend in other states, we believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

Arnold v. Cleveland, 67 Ohio St. 3d 35, 42, 616 NE 2d 163, 169 (1993).[2]

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[1] *Cf. Pennsylvania v. Muniz*, 496 U.S. 582, 588, n.4 (1990) (commonwealth's constitutional protection against self-incrimination identical to that provided by the federal Fifth Amendment); *Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987) (state constitutional provision construed *in pari materia* with the federal Fourth Amendment).

[2] *See also State v. Brown*, 63 Ohio St. 3d 349, 352, 588 NE 2d 113, 115 (1992). ("If [*New York v.*] *Belton* [453 U.S. 454 (1981)] does stand for the proposition that a police officer may conduct

Amicus endorses the above-quoted language and seeks to increase Ohio's body of *state* constitutional jurisprudence. For this reason, amicus finds the instant case of particular significance. While there can be no doubt that "a State may not impose such greater restrictions [on police activity] as a matter of *federal constitutional law* when this Court specifically refrains from imposing them". *Oregon v. Haas*, 420 U.S. 714, 719 (1975), it is no less true that "[i]ndividual states may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution". *California v. Greenwood*, 486 U.S. 35, 43 (1988).[3]

Amicus would observe that the brief submitted by Petitioner, the State of Ohio, in this cause, as well as those of the amici writing in its support, concentrate their arguments entirely upon federal Fourth Amendment considerations. Amicus believes this overlooks a more fundamental, *jurisdictional* question which should first be considered by the Court. This is, at heart, a question of Federalism, with far broader ramifications than the limited search and seizure issue discussed by Petitioner and its friends of the court.

For the above-stated reasons and those discussed below, amicus curiae Ohio Association of Criminal

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a detailed search of an automobile *solely* because he has arrested one of its occupants, *on any charge*, we decline to adopt its rule.")

[3] *See also Minnesota v. Olson*, 495 U.S. 91, 102 (1990) (Stevens, J., dissenting). ("Only in the most unusual case should the Court volunteer its opinion that a state court has imposed standards on its own law enforcement officials that are too high.")

Defense Lawyers asks this Court to hold that the judgment of the Ohio Supreme Court in this case rests upon adequate and independent state grounds and dismiss the writ of certiorari as having been improvidently granted.

STATEMENT OF FACTS

Amicus Curiae, The Ohio association of Criminal Defense Lawyers, respectfully defers to the statement of facts and procedural posture submitted by Respondent in his merit brief in this case.

SUMMARY OF ARGUMENT

The opinion of the Ohio Supreme Court below is based on adequate and independent state grounds, to wit, Section 14, Article I of the Ohio Constitution. The rule fashioned by the court below is purely prophylactic and, as such, is not compelled by federal constitutional law. The writ of certiorari in this case should be dismissed as having been improvidently granted.

ARGUMENT

The Decision Of The Supreme Court Of Ohio Rests Upon Adequate And Independent State Constitutional Grounds, Thereby Precluding Review By This Court. The Writ Of Certiorari In This Case Should Be Dismissed as Having Been Improvidently Granted.

It has been a long established principle that this Court will not exercise its jurisdiction to review a judgment of a state court when such judgment rests upon adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940); *Fox Film Corp. v. Muller*, 269 U.S. 207 (1935); *Murdock v. City of Memphis*, 87 U.S. [20 Wall.] 590 (1875). In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court adopted the following rule for determining under what circumstances the decision of a state supreme court is grounded upon an independent and adequate state law basis whereby this Court would decline review:

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground

> is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id. at 1040-41. It is the position of amicus OACDL that insofar as the decision below rests upon *both* the Fourth Amendment of the United States Constitution *and* Section 14, Article I of the Ohio Constitution, this Court should decline to review it.

The Ohio Supreme Court based its opinion in the instant matter to a decree upon its prior opinion in *State v. Chatton* 11 Ohio St. 3d 59, 463 NE 2d 1237 (1984), which held:

> . . . where a police officer stops a motor vehicle which displays neither front nor rear license plates, but upon approaching the stopped vehicle observes a temporary tag which is visible through the rear windshield, the driver of the vehicle may not be detained further to determine the validity of his driver's license absent some specific and articulable facts that the

> detention was reasonable. As a result, any evidence seized upon a subsequent search of the passenger compartment of the vehicle is inadmissible under the Fourth Amendment to the United States Constitution.

Id. at 63, 463 NE 2d at 1240-41. *Chatton*, however, should not be read as necessarily based *solely* on the Ohio Supreme Court's interpretation of the Fourth Amendment, as evidenced by footnote 4 of the opinion:

> We acknowledge that in January of this year the United States Supreme Court heard arguments on whether to recognize a good faith exception to the Fourth Amendment exclusionary rule. *Massachusetts v. Sheppard* (1982), 387 Mass. 488, 441 N.E. 2d 725, certiorari granted (1983), 77 L. Ed. 2d 1386; *United States v. Leon* (C.A. 9, 1983), 701 F.2d. 187, certiorari granted (1983), 77 L. Ed. 2d 1386. It would appear that a mistaken belief on the part of a police officer that an individual's conduct is a violation of the law would not fall within such a good faith exception if adopted by the Supreme Court. Nonetheless, even should a good faith exception to the exclusionary rule be recognized for Fourth Amendment purposes, the question remains whether we would likewise recognize such an exception under Section 14, Article I of the Ohio Constitution.

Chatton, supra at 63, 463 NE 2d at 1241, note 4. Although *Chatton* is ostensibly based upon Fourth Amendment grounds, the Ohio Supreme Court clearly suggests that its holding is alternatively mandated under the Ohio Constitution.

While the *Chatton* decision informs the opinion of the Ohio Supreme Court in Respondent's case, it can hardly be viewed as compelling it; indeed, *Chatton* provides only a spring-board premise for the "bright line" rule announced below. Confronted by the peculiar scenario of Respondent's case, the Ohio Supreme Court noted:

> The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow.
>
> The present case offers an example of the blurring between a legal detention and an attempt at consensual interaction. Even assuming that Newsome's detention of Robinette was legal through the time when Newsome handed back Robinette's driver's license, Newsome then said, "One question *before you get gone:* are you carrying any illegal contraband in your car?" (Emphasis added.) Newsome tells Robinette that before he leaves Newsome wants to know whether Robinette is carrying any contraband. Newsome does not ask if he may ask a question, he simply asks it, implying that Robinette must respond before he may leave. The interrogation then continues. Robinette is never told that he is free to go or that he may answer the question at his option.
>
> Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of

authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.

We are aware that consensual encounters between police and citizens are an important, and constitutional, investigative tool. *Florida v. Bostick* (1991), 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389. However, citizens who have not been detained immediately prior to being encountered and questioned by police are more apt to realize that they need not respond to a police officer's questions. A "consensual encounter" immediately following a detention is likely to be imbued with the authoritative aura of the detention. Without a clear break from the detention, the succeeding encounter is not consensual at all.

Therefore, we are convinced that the right, guaranteed by the federal and Ohio Constitutions to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.

While the legality of consensual encounters between police and citizens should be preserved, we do not believe that this legality should be used by police officers to turn a routine traffic stop into a fishing expedition for

unrelated criminal activity. The Fourth Amendment to the federal Constitution and Section 14, Article I of the Ohio Constitution exist to protect citizens against such an unreasonable interference with their liberty.

State v. Robinette, supra at 654-55, 653 NE 2d at 698-99. The court below thus recognized that the scenario presented in Respondent's case is inherently problematic; when seized in one's automobile as part of a routine traffic stop, at what juncture that detention is transformed into a "consensual encounter" is fraught with ambiguity, and the risk of police taking unwarranted advantage of this ambiguity is high.[4] In an effort to *prevent* such misbehavior by the police, and in the *absence* of any

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[4] The scenario as played out in Respondent's case is virtually identical to that in *United States v. Sandoval*, 29 F.3d 537 (10th Cir. 1994) where in response to the motorist's question. "That's it?", the officer, with no articulable suspicion to continue the investigatory stop, replied. "No. Wait a minute." *Id.* at 538-39. Applying a "totality of the circumstances" analysis, the United States Court of Appeals for the Tenth Circuit held the motorist's consent to search was tainted by an unconstitutional seizure. *Id.* at 544-45. *Compare United States v. Rusher*, 966 F.2d 868 (4th Cir. 1992); *United States v. Rivera*, 906 F.2d 319 (7th Cir. 1990); *United States v. Ruesga-Ramos*, 815 F. Supp. 1393 (E. Dist. Wash. 1993) (in all of which the investigatory stop was deemed terminated by the officer advising the motorist he was free to go). Under these cases, "bright line" rule notwithstanding, it would seem the Ohio Supreme Court has arrived at the correct *judgment* in holding the evidence inadmissible. *Cf. Herb, supra* at 125-26 ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions.") (opinion of Jackson, J.).

supporting case law, state *or federal*, the Ohio Supreme Court set forth the "bright line" rule in controversy, holding it to be necessitated by the Ohio Constitution as well as the Fourth Amendment of the United States Constitution. The court below has fashioned, as Petitioner correctly observes, a *prophylactic* rule, not different in kind from this Court's exclusionary rule in *Mapp v. Ohio*, 367 U.S. 643 (1961), and more similar still to the "warning" required by *Miranda v. Arizona*, 384 U.S. 436 (1966). (See Brief of Pet. at 13-14; see also Brief of Amici States at 8, 14; Brief of Amicus United States at 11-12, 19-20). It is precisely the prophylactic nature of the rule devised by the court below which should serve to insulate the decision from federal review.

This Court has on numerous occasions taken the opportunity to discuss at length the concept of the term "prophylactic" and what the word implies in the context of the exclusionary rule. In its *Miranda* opinion, this Court noted:

> [W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.

Miranda, supra at 467. "The prophylactic *Miranda* warnings therefore are not themselves rights protected by the Constitution but are instead measures to insure that the right against compulsory self-incrimination is protected." *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (opinion of Rehnquist, C.J.); *New York v. Quarles*, 467 U.S. 649, 654 (1984) (opinion of Rehnquist, J.); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (opinion of Rehnquist, J.).

"The *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself", it necessarily "sweeps more broadly than the Fifth Amendment itself" and it "may be triggered even in the absence of a Fifth Amendment violation. . . . *Like all prophylactic rules*, the *Miranda* rule 'overprotects' the value at stake." *Duckworth, supra* at 209 (O'Connor, J., concurring) (citations omitted) (emphasis added). Similarly, "the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), was *not the inevitable product* of the Constitution but instead a judicially created remedy." *Withrow v. Williams*, ___ U.S. ___, 123 L.Ed. 2d 407, 426 (1993) (O'Connor, J., concurring in part and dissenting in part) (emphasis added). *See also Stone v. Powell*, 428 U.S. 465 (1976) (opinion of Powell, J.); *United States v. Calandra*, 414 U.S. 338 (1974) (opinion of Powell, J.).

In Respondent's case, the Ohio Supreme Court has fashioned a prophylactic rule to insure against the police taking unwarranted advantage of the power dynamics inherent in a routine traffic stop for the purpose of conducting purportedly consensual searches unrelated to the stop itself. While the court below based this rule in part on the Fourth Amendment, it also found support for it in the Ohio Constitution. But, as stated above, *by the very nature of a prophylactic rule*, the conclusion of the court below is not "required", *Long, supra* at 1041, by that court's understanding of federal law, anymore that it is "required" by the Ohio Constitution. Rather,

> The rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the

> only effectively available way – by removing the incentive to disregard it.

Elkins v. United States, 364 U.S. 206, 217 (1960) (opinion of Stewart, J.). In assessing whether this prophylactic rule is based upon adequate and independent state grounds, that is, Section 14, Article I of the Ohio Constitution, amicus respectfully invites this Court to revisit an issue considered, but left unresolved, in the Court's opinion in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

In *Van Arsdall*, the Delaware Supreme Court had held that any improper restriction of a criminal defendant's right to cross-examine a prosecution witness for bias was *per se* violative of the confrontation clauses of the Sixth Amendment of the United States Constitution and Article I, Section 7 of the Delaware Constitution and further held that consideration of the "harmless error" analysis of *Chapman v. California*, 386 U.S. 18 (1967) was not mandated. On writ of certiorari, this Court reversed. Writing in dissent, Justice Stevens observed:

> Despite the directness of the route chosen, today's destination was not foreordained. Unlike *Michigan v. Long*, this case concerns whether the Court should presume jurisdiction to review a state supreme court's *remedy* for a federal constitutional violation. Since courts have traditionally enjoyed broad discretion to fashion remedies – even remedies forbidding otherwise lawful acts – once a constitutional violation has been proved, the more logical direction would have been to presume that a state court is merely exercising its normal supervisory power over state officials unless it clearly

> states that federal law requires a particular procedure to be followed. The Court's contrary presumption works a further advancement of its own power, but it flouts this Court's best traditions: it deviates from our normal approach to questions of subject-matter jurisdiction, and it departs from our long-standing practice of reserving decision on federal constitutional law. Even considered purely from the standpoint of managing our own discretionary docket, the Court's presumption includes a selection bias inconsistent with the lessons of history as revealed in this Court's statutory jurisdiction over the judgments of state courts. Finally, the Court's willingness to presume jurisdiction to review state remedies evidences a lack of respect for state courts and will, I fear, be a recurrent source of friction between the federal and state judiciaries.

Van Arsdall, supra at 690-91 (Stevens, J., dissenting) (footnote omitted). The majority of this Court, however, declined to examine Justice Stevens' argument in detail, stating only in a footnote,

> Respondent asserts that this Court is without jurisdiction to hear this case because the Delaware Supreme Court's automatic reversal rule rests on an adequate and independent state ground. He argues that the rule was adopted not on the basis of federal constitutional law but as a prophylactic device, announced under that court's "superintending" authority, to "send an unequivocal message" to state trial judges about the importance of permitting liberal cross-examination. Brief for Respondent 41. We disagree.

"[W]e will not assume that a state-court decision rests on adequate and independent state grounds when the 'state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Caldwell v. Mississippi*, 472 US 320, 327, 86 L Ed 2d 231, 105 S Ct 2633 (1985) (quoting *Michigan v Long*, 463 US 1032, 1040-1041, 77 L Ed 2d 1201, 103 S Ct 3469 (1983)). The opinion of the Delaware Supreme Court, which makes use of both federal and state cases in its analysis, lacks the requisite "plain statement" that it rests on state grounds. *Michigan v Long, supra*, at 1042, 1044, 77 L Ed 2d 1201, 103 S Ct 3469. *Indeed, the opinion makes no reference to any "superintending" authority, and nowhere suggests the existence of a state prophylactic rule designed to insure protection for a federal constitutional right. We read the decision below as resting on federal law.*

Id. at 678, note 3 (emphasis added). The instant case considers the same issue, that is, under what circumstances will a state court fashioned *remedy* be deemed as resting upon adequate and independent state grounds; this case, however, must be distinguished from *Van Arsdall* in several significant ways.

The opinion of the Delaware Supreme Court, although citing to the confrontation provision of the Delaware Constitution in a footnote, nevertheless arrived at its holding in large part by consideration of federal cases, most notably *Davis v. Alaska*, 415 U.S. 308 (1974); a *state* court decision, also relied upon, *Weber v. State*, 457 A 2d

674 (Del. 1983), spoke only of *federal* confrontation clause analysis. At no point in the Delaware Supreme Court's opinion did it suggest a departure from federal constitutional standards in favor of broader rights under the Delaware Constitution, nor was it ever suggested that that court intended to fashion a rule which would "send an unequivocal message." *See Van Arsdall v. State*, 486 A 2d 1, 6-7 (Del. 1984).

In Respondent's case, there is no question, and Petitioner concedes, that the Ohio Supreme Court's "at this time you legally are free to go" rule is *purely* prophylactic, which is to say, is not *syllogistically derived* from prior federal precedent, and therefore, it cannot be said that it "fairly appears to rest primarily on federal law or to be interwoven with the federal law". *Long, supra*, at 1040. Rather it must be viewed instead as a judicially created remedy, cut from whole cloth, based upon what the Ohio Supreme Court below found was necessary to "overprotect the value at stake" in Ohio's Constitution. *Cf. Duckworth, supra* at 209 (O'Connor, J., concurring). With this in mind, amicus suggests that "the most reasonable explanation that the state court decided the case the way it did" was emphatically *not* "because it believed that federal law required it to do so". *Long, supra* at 1041.

Amicus concedes that the opinion of the court below, resting as it does on a provision of the Ohio Constitution, unnecessarily undertakes a discussion of the federal Fourth Amendment. Certainly the preferable course for the Ohio Supreme Court would have been to "analyze the state's law, including its constitutional law, before reaching a federal constitutional claim". *Massachusetts v. Upton*, 466 U.S. 727, 736 (1984) (Stevens, J., concurring) (citing

Sterling v. Cupp, 290 Ore. 611, 614, 625 P2d 123, 126 [1983]). It is also conceded that the court below did not recite the "plain statement" contemplated by *Long*, although by doing so it would not have invited this Court's grant of certiorari. *Upton, supra* at 729-30 (Stevens, J., concurring). Magic words notwithstanding, Ohio's "bright line" rule, devised to insure compliance with Section 14, Article I of the Ohio Constitution, is clearly supported by adequate and independent state constitutional grounds, and this Court should dismiss the writ. Alternatively, if this Court finds that the decision of the court below, "even if arguably placed on a state ground, embodies a misconstruction of federal law threatening gravely to mislead, or to engender disuniformity, confusion or instability, a Supreme Court order vacating the judgment and remanding for clarification should suffice." *Arizona v. Evans*, 514 U.S. ___, 131 L.Ed. 2d 34, 59, note 7 (1985) (Ginsburg, J., dissenting).[5]

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[5] Amicus would respectfully remind the Court that for practical purposes this often is the result in any event, providing for an unfortunate and ever-increasing jurisprudence of advisory opinions, a constitutional evil the rule in *Long* was devised to avoid. *See Montana v. Hall*, 481 U.S. 400, 411 (1987) (Stevens, J., dissenting); *Ponte v. Real*, 471 U.S. 491, 503, n.4 (1985) (Stevens, J., dissenting); *Herb, supra* at 126 ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.") (opinion of Jackson, J.).

CONCLUSION

For the above-stated reasons, amicus curiae, the Ohio Association of Criminal Defense Lawyers, respectfully urges this Honorable Court to dismiss the writ of certiorari as having been improvidently granted in this case.

Respectfully submitted,

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